Supreme Court, U.S.
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No._____

IN THE

# Supreme Court of the United States

October Term, 1997

BOB GLASER,
Petitioner,

v.

CITY OF SAN DIEGO,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals for the Ninth Circuit

## PETITION FOR A WRIT OF CERTIORARI

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32 pp

## QUESTIONS PRESENTED FOR REVIEW

A. Was the initial premise in which the District Court relied upon, and the Appellate Court reviewed to determine the appropriateness of sanctions flawed?

B. Did the District Court set forth a specific basis, as required, to determine sanctionable conduct, specifically regarding the claims against Respondent?

C. Without the specific and explicit finding of bad faith, were sanctions appropriate?

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## PETITION FOR A WRIT OF CERTIORARI

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Petitioner, BOB GLASER, respectfully petitions this Court to grant Certiorari to review the Memorandum decision of the United States Court of Appeals for the Ninth Circuit which affirmed the United States District Court's ruling of sanctions pursuant to Federal Rule of Civil Procedure 11.

## I
## STATEMENT OF JURISDICTION

On March 18, 1998, the United States Court of Appeal for the Ninth Circuit issued a Memorandum decision in Case No. 97-55476. The matter was submitted on March 4, 1998 without oral argument. On May 8, 1998, the Ninth Circuit denied Appellant's Petition for Rehearing, and rejected the Suggestion for Rehearing En Banc. It is that order sought to be reviewed as well as the Memorandum decision issued by the Circuit Court. This Court has jurisdiction to review this matter on a Writ of Certiorari pursuant to 28 U.S.C. 1245.

## II
## APPLICABLE CONSTITUTIONAL PROVISIONS

FOURTH AMENDMENT

> The right of the people to be secured in their persons, houses, papers, and effects against unreasonable searches and seizures shall not violated

FOURTEENTH AMENDMENT

Section 1

> ... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

## III
## APPLICABLE FEDERAL STATUTE

42 U.S.C. §1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the

> jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ...

## IV
## APPLICABLE FEDERAL RULE

Federal Rule of Civil Procedure 11 states in relevant part:

> (b) By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, ____
>
> > (1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation ...
> >
> > (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to

> have evidentiary support after a reasonable opportunity for further investigation nor discovery; and ...
>
> (c ) If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.
>
> (3) When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

## V
## STATEMENT OF FACTS

Plaintiff/Appellant/Petitioner was one of 54,000 paying patrons attending a sold-out Elton John and Billy Joel concert at San Diego Jack Murphy Stadium on March 22, 1995. During the

pendency of the event, men's and women's restrooms were filled beyond capacity, and women were allowed to enter the men's restrooms despite signs, security and prior knowledge of such conduct, by the inactions or omissions of Defendant/Appellee/Respondent, CITY OF SAN DIEGO. At times the wait for women's restroom facilities was forty-five minutes. Petitioner while his genitalia was exposed, urinating in a trough in one of the men's restrooms, was confronted by the presence of women, and in particular, on two different occasions, female patrons who pulled down their pants, and underwear, and backed up and squatted next to Petitioner also urinating in the same trough. Petitioner was angered, upset, embarrassed, distraught and felt violated when his privacy was invaded in an unhealthy and unsanitary manner.

Respondent, CITY OF SAN DIEGO, who was responsible for the construction maintenance and overseeing of the stadium, had been previously formally informed of the occurrence of this activity on their premises, made statements it would be corrected, however, took no steps to remedy or correct the situation.

Petitioner filed a Complaint in the Federal District Court pursuant to 28 U.S.C. §1331 and §1343 complaining of constitutional violations and civil rights infringements pertaining to all Defendants, including Respondent. Pendent jurisdiction over the state claims were authorized by 28 U.S.C. §2201 and §2202.

## VI
## STATEMENT OF CASE

Petitioner filed his administrative claim on March 27, 1995, which was categorically denied. On October 31, 1995, Petitioner filed his complaint for injunctive, declaratory, and compensatory relief against said Respondent.

On January 2, 1996, the District Court heard Respondent's FRCP 12 (b) (6) motion and granted the same *without prejudice* allowing Petitioner 30 days to cure the deficiencies and file an amended complaint.

On February 5, 1996, Petitioner filed his first amended complaint, and Respondent thereafter, filed their 12 (b)(6) motion to dismiss. On March 25, 1996, the District Court heard Respondent's

12(b)(6) motion and granted the dismissal with prejudice.

On May 13, 1996, the Court granted Respondent's motion to impose FRCP Rule 11 sanctions against Petitioner and Petitioner's attorney. On August 9, 1996, the Court set the amount of sanctions and entered the order on September 16, 1996. On October 11, 1996, Petitioner filed his notice of appeal.

On May 14, 1997, Petitioner filed his Opening Brief before the United States Court of Appeal for the Ninth Circuit. On June 13, 1997, Respondent filed their Opposition Brief, and on July 3, 1997, Petitioner filed his Reply Brief.

In August 7, 1997, the United States Court of Appeal notified the parties that they were considering submission without oral argument. On October 20, 1997, they determined that oral argument was appropriate, setting the same for March 4, 1998. The Court then determined on February 24, 1998, that oral argument was not warranted, and rendered its Memorandum decision on March 18, 1998, affirming the decision of the District Court.

On April 7, 1998, Petitioner filed a Petition For Rehearing And Suggestion For Rehearing En Banc. On May 8, 1998, the

United States Court of Appeals for the Ninth Circuit rejected Petitioner's Petition For Rehearing And Suggestion For Rehearing En Banc.

The Petitioner now files his Petition for Writ of Certiorari. The requested review is limited to the appropriateness of the sanction award, and those subsidiary issues fairly included therein.

## VII
## ARGUMENT

### OVERVIEW

The Memorandum decision of March 18, 1998, by the United States Court of Appeal for the Ninth Circuit is in conflict not only with decisions in that circuit, but with decisions other circuit courts of appeal, especially the second circuit, and further is in conflict with this Court's decision in *Cooter & Gell v. Hartmark Corp.*, 496 U.S. 384 (1990).

On the issue of proper determination for the award of sanctions pursuant to Federal Rules Civil Procedure 11, the lower courts inappropriately focused on the unique fact pattern presented, Petitioner's claims as to other parties not subject to these

proceedings, and not on Petitioner's claims solely as to Respondent.

## A. THE INITIAL PREMISE WHICH THE DISTRICT COURT RELIED UPON, AND THE APPELLATE COURT REVIEWED, WAS FLAWED

The Circuit Court characterized Petitioner's first amended complaint as "near-identical." The District Court and Respondent have characterized Petitioner's first amended complaint as a "near-replica." This reviewing Court is directed to the original complaint and the first amended complaint. While the pendent state claims are nearly identical or near replicas, the District Court never addressed those claims, therefore no changes were made. What the first amended complaint does add however, is clarification of the expectation of privacy, to *single sex* expectation of privacy.

The right to bodily privacy is independent and fundamental. The Ninth Circuit in *York v. Story*, 324 F.2d 450, 455 (9th Cir. 1963) has held that a separate and distinct right of bodily privacy exists independent of the Fourth Amendment, and is rooted in the Due Process Clause of the Fourteenth Amendment.

> We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield

> one's unclothed figured [sic] from the view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity.

Moreover, the Ninth Circuit in *Sepulveda v. Ramirez*, 967 F.2d 413, 416 (1992) held on similar facts that the right to bodily privacy was fundamental. There, a male parole officer directly viewed a female parolee urinating during a drug test. The Court suggested again that the female parolee had a basic fundamental right not to be viewed by someone of the opposite sex.

These cases clearly illustrate that a fundamental right does exist where one is viewed by an individual of the opposite sex without consent. The court has held that "the rights found in the guarantee of personal privacy are limited to those which are fundamental or implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). This concept was reaffirmed in *Roe v. Wade*, 410 U.S. 113, 155 (1973), and in *Grummett v. Rushen*, 779 F.2d 491, 496 (9th Cir.1985), which reinforced that the right to bodily privacy is a fundamental right.

In *Hansen v. California Department of Corrections*, 920 F. Supp. 1480, 1496, (N.D. Cal. 1996), the Court emphasized that:

> while the right to privacy may have roots in several different provisions of the Constitution, it is unlikely that when the government conduct that invades that right, clearly constitutes a "search."

Therefore, Petitioner's right to bodily privacy is independent of the Fourth Amendment analysis and was properly argued as such. Furthermore Petitioner sought to distinguish, on one basis, the case of *Katz v. United States*, 389 U.S. 347 (1987), and subsequent cases put forth by the Respondent, by showing that these cases dealt with the issue of privacy in the context of criminal custody. Being in custody in a criminal case is extremely different than the privacy issue while in a gender specific restroom.

Additionally, the claim of deliberate indifference was addressed in Petitioner's First Amended Complaint. Petitioner also added allegations giving rise to a special relationship, and identification of affirmative acts, and further clarifying the danger creation doctrine.

creation doctrine.

Where a state actor violates one's right to bodily privacy, an action based on 42 U.S.C. Section 1983 will lie.

The Fourteenth Amendment of the U.S. Constitution provides in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law

42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The claim, therefore, under 42 U.S.C. §1983 was at least

arguably viable according to this Court in *West v. Atkins*, 487 U.S. 42, 48 (1988) as long as Petitioner was able to prove two things:

> the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law. (Citations).

The court has held that the requirements "under color of state law" is consistently treated as state action "as required under the Fourteenth Amendment" as enumerated above, *Rendell- Baker v. Kohn*, 457 U.S 830, 836 (1982). The purpose of a 42 U.S.C. §1983 action is to "deter a state actors from using the badge of their authority to deprive individuals of their federally guaranteed right and to provide relief to victims when such deters fail." *Wyatt v. Cole*, 504 U.S 158, 161 (1992). A good faith argument was thereof advanced for an extension or modification of existing law.

Petitioner also added allegations to his complaint to further substantiate a *Monell claim* as addressed by the District Court during the hearing on Respondent's initial 12 (b) (6) motion of January 2, 1996. *Monell v. New York City Dept. of Social Services*, 436 U.S.

658 (1978) at 694 held:

> it is when execution of a government's policy or custom, whether made by its law makers or by those whose edicts or acts may fairly be said to represent official policy, inflict the injury that the government as an entity is responsible under Section 1983.

As this principle pertains to the case at bar, it was the Stadium Authority as the governing arm of Respondent, who made and enforced all policy, for all events at the stadium.

Lastly, Petitioner also seriously reviewed and considered all comments made by the District Court, and acknowledged that his claim for discrimination pursuant to 42 U.S.C. §2000 was unwarranted, and deleted the same.

The Court in *Woodrum v. Woodward County, Okl.*, 866 Fd. 2d 1121, 1127 (9th Cir. 1989) acknowledged that "whether specific conduct violated Rule 11 is a legal issue reviewable *de novo*." (Emphasis in original). The Ninth Circuit as well as other circuits have at times stated a "snapshot rule" as to when the determination of Rule 11 applicability must be looked at, the moment of signature.

Petitioner's arguments, if arguably creative, cannot now be looked at in hindsight and reviewed for its merit with regard to whether or not it was a frivolous one to make. The eyes of the law, in reviewing Appellant's pleading, the court has to give every benefit of the doubt in favor of the Appellant. *Association Indem. Corp. v. Fairchild Industries Inc.*, 961 F2d 32, 34 (2nd Cir. 1992). The Court went on to say that the trial court must determine when the argument "turns from merely losing to losing and sanctionable." Id. The 2nd Circuit echoed the precautions of imposing sanctions in hindsight by saying that courts must avoid the "wisdom of hindsight" in determining whether a nonfrivolous argument existed for the validity of a pleading at the time it was signed. *Eastway v.Contruction Corp.*, 762 F2d 243, 254 (2nd Cir. 1985).

In that regard, this rule should not have been allowed to be used as a sword against Petitioner to "chill" the creativity from an attorney, in pursuing a multitude of factual and legal theories, nor used to dissuade an attempt to change existing law. *Greenberg v. Sala*, 822 F2d 882, 887 (9th Cir. 1987). The Third Circuit has put it this way, saying that as long as the attorney's "creativity must be

in service of a good faith application of the law or at least a good faith request for a change in the law" imposition of sanctions are inappropriate. *Gaiardo v. Ethyl Corp.*, 835 F2d 479, 484 (3rd Cir. 1987). The Third Circuit at 483 indicated that Rule 11 sanctions do not automatically flow from just an adverse ruling. The Court held that:

> "Litigants misuse the Rule when sanctions are sought against a party or counsel whose only sin was being on the unsuccessful side of a ruling or judgment."

Therefore, just because Petitioner was unsuccessful in persuading the District Court that a federal cause of action exists on our present facts, it does not necessarily give rise to a case for sanctions.

If this Court will step back and see the definitive changes between the original complaint and the first amended complaint, and the arguments advanced in furtherance of Petitioner's 42 U.S.C. §1983 and constitutional claims, it can be clearly seen why the initial basis for the granting of sanctions was flawed.

**B. THOUGH REQUIRED, THE DISTRICT COURT NEVER SET FORTH THE SPECIFIC BASIS FOR**

The relevant portion of FRCP 11 is set forth in subsection (c) (3) as follows:

> When imposing sanctions, the Court shall describe the conduct determined to constitute a violation of this Rule and explain the basis for the sanction imposed.

In *Cooter & Gell v. Hartmarx Corp.*, supra at 405 this Court stated that "an appellate court should apply an abuse-of-discretion standard in reviewing *all aspects* of a district court's Rule 11 determination." (Emphasis added).

The Ninth Circuit Court in *Security Farms v. International Broth.*, 124 Fd. 3d 999, 1016 (9th Cir. 1997) acknowledged this principle stating "We review all aspects of a district court's Rule 11 determination for abuse of discretion. (Citation)."

As stated, from the inception of this claim and the facts which give rise thereto, a novel and interesting scenario is presented. While it may not be often the case where a male has his privacy invaded and is confronted and upset by females urinating in front of him during his urination, in public single sex bathroom, but this is exactly what happened here. The District Court found state action

him during his urination, in public single sex bathroom, but this is exactly what happened here. The District Court found state action *as against Respondent*, but not the women who used the bathroom, the concessionaire, the promoter, the security company, or the actions of the artists themselves.

A review of the transcript of proceeding of March 25, 1996 will note that the questions from the Court were seeking information on state action concerning the concessionaire. Furthermore the court found at page 20, lines 19 through 21:

> With respect to all Defendants, except the City of San Diego, the Court believes that there has not been sufficient allegations for a state action.

And at p. 24, lines 15 through 16:

> For some reason, I see the City in a slightly different position than the lack of state action.

The Court's order of August 8, 1996 further addresses their concerns as to the concessionaire and promoter at page 13, lines 14 through 7:

> The Court questions counsel's

> complaint when the federal jurisdiction was based upon claims requiring state actions.

In the Court's various sanction orders, the Judge always separated Respondent, CITY OF SAN DIEGO from the other Defendants. The Court was not impressed with Petitioner's inclusion of the other Defendants, and was not shy in expressing that opinion. However, on each occasion Respondent was ***not*** placed in that same category.

It was Respondent who set the standards, rules, requirements, and permitting process of the stadium, actually built and maintained the stadium, also decided how many men's restrooms and how many women's restrooms would be available for any particular event, and what measures would be taken to patrol the facilities.

In *Griffin v. City of Oklahoma City*, 3 F.3d 336, 340 (10th Cir. 1993), the Court addressed this issue of particularity, however, the facts were different in that they were criticizing why sanctions were not imposed.

> It is not obvious to us from the record why Rule 11 sanctions are not warranted. Because we cannot

> It is not obvious to us from the record why Rule 11 sanctions are not warranted. Because we cannot tell from the court's order why it refused to impose sanctions, we are left with no means by which to judge the exercise of the court's discretion. (Citation).

In that case as in the present case, the requirement of Rule 11 (c ) (3) was not followed. This Court in *Cooter & Gell*, supra at 405, held:

> A district court would necessary abuse its discretion if it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.

The District Court based its ruling on a clearly erroneous assessment of the evidence, since there ***were no evidentiary proceedings at the time the sanction was issued***. Furthermore, the standard of basing its ruling on an erroneous view of the law, is also applicable here given the absence of any specific basis or conduct, *specifically* pertaining to Respondent. *Katz v. Household Intern, Inc.*,36 Fd. 3d 670 (7th Cir. 1994) at 673, further noted the requirement of particularity.

> "A district court abuses its discretion when it [grants or] denies sanctions with no explanation, or with an explanation that is so conclusionary that the appellate court cannot review the substance of its decision." (Citation).

In their review of "all aspects" of the District Court's order, the reviewing Court further did not address the propriety of the Judge's "proposal" to Petitioner to give up his claim for a waiver of sanctions. This "proposal" was clearly an unfettered abuse of the District Court's discretion, bestowing upon them extra powers which are not authorized. Despite the amount of sanctions, and despite the District Court's "proposal," the basis, or more specifically, the lack thereof, the imposition of sanctions made as to Respondent, was just improper, henceforth this petition.

## C. AN EXPLICIT FINDING OF BAD FAITH IS REQUIRED AND IN THE ABSENCE THEREOF, SANCTIONS WERE INAPPROPRIATE

The Ninth Circuit Court held in *Primus Automotive Financial Services, Inc., v. Batarse*, 115 Fd. 3d 644, 649 (9th Cir. 1997):

> The bad faith requirement sets a high threshold ... We insist on the finding of bad faith because it ensures that "restraint is properly exercised," *Id.* and it preserves a balance between protecting the court's integrity and encouraging meritorious arguments.

In that case, the district court fell below that threshold, despite finding the attorney's conduct was, "totally frivolous", "outrageous", "inexcusable", and "appalling". In the case at bar the District court stated at page 15 of their August 9, 1996 Order, "the court **does not reach the issue of bad faith.**" (Emphasis added). The circuit courts have made the requirement of an explicit bad faith finding a prerequisite to insure that the imposition of sanctions is restrained. The District court in the case at bar did not exercise the required restraint, therefore, their ruling must be overturned.

The Circuit Court did not address this decision in their memorandum opinion of March 18, 1998. The reviewing Court, however, did acknowledge that the District Court "stopped short of deciding that the Petitioner's action was filed for an improper purpose." Additionally, the Circuit Court stated, "the Court does not

reach the issue of bad faith." Despite the Circuit Court's finding that the District Court's finding of no improper purpose *was* an improper purpose, and the combination of lack of bad faith and no improper purpose, is sufficient grounds not to justify, or not to warrant the imposition of sanctions. The other districts are in agreement with the Ninth Circuit when they held *Primus*, supra at 650.

> **"we *require* courts levying sanctions to assess an attorney's individual conduct and to make an explicit finding that he or she acted in bad faith."**
> (Emphasis added).

In *Corporate Printing Co. Inc. v. New York Typo Union No. 6*, 886 Fd. Supp. 340, 344 (S.D.N.Y. 1995):

> It must be noted that the Second Circuit has maintained that a **finding of bad faith must be made for the imposition of sanctions**. (Emphasis added).

In *Kovia v. Fulton County N.A.T. Bank and Trust Co.*, 857 Fd. Supp. 1032, 1042 (N.D.N.Y. 1994):

> The **record is devoid of evidence that attorney Matthews raised his arguments in bad faith or for an improper purpose,** the Court

> finds that central goal of Rule 11, namely to deter baseless filings, will not be forwarded by the imposition of sanctions. (Citation). (Emphasis added).

In *Rosenheck v. Rieber* 932 Fd. Supp. 626, 628 (S.D.N.Y. 1996):

> the Court ... cannot unequivocally conclude that the Complaint was interposed for improper purpose or that it was "patently clear that [the RICO] claim ha[d] absolutely no chance of success ..." (Citation). Accordingly, an award of Rule 11 Sanctions is not warranted.

The combination of lack of bad faith, and acknowledged finding of lack of improper purpose is sufficient to overturn the ruling of sanctions. The Circuit Court attempted to look at the mental state of the District Court in the meaning of "improper purpose," and by doing such, they are, without justification or basis in expanding that meaning as a matter of law.

## VIII
## CONCLUSION

For those reasons stated herein, it is requested that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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